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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-924

LAFAYETTE AIRPORT COMMISSION ET AL.,
Petitioners,

versus

J. MAXIME ROY ET AL and ACADIAN DEVELOPMENT CORPORATION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

JAMES E. DIAZ
P. O. Box 3507
Lafayette, Louisiana 70501

W. C. HOLLIER
P. O. Box 52209
Lafayette, Louisiana 70501

Attorneys for Respondents

EDWARD C. ABELL, JR.
P. O. Drawer 3507
Lafayette, Louisiana 70501

MORGAN J. GOUDEAU, III
170 West Bellevue Street
Opelousas, Louisiana 70570

OF COUNSEL

INDEX

Page

LIST OF AUTHORITIES i

STATEMENT OF THE CASE 1

ARGUMENT:

I. The petition for certiorari should be denied on jurisdictional grounds because the federal question was not timely and properly raised in the state courts below 6

II. The Airport Commission availed itself of the opportunity of examining and rebutting the Defendants' Proffer of Evidence and hence was not denied its right to a hearing on the evidence 9

CONCLUSION 14

CERTIFICATE OF SERVICE 15

LIST OF AUTHORITIES

Cases:

Broussard vs. State Farm Mutual Automobile Ins. Co., 188 So.2d 111 (La. App. 1966) 12

Bilby vs. Stewart, 246 U.S. 255, 38 S.Ct. 264 (1918) 9

Blaize vs. Hayes, 204 La. 298, 15 So.2d 228 (1943) 9

Cardinale vs. Louisiana, 394 U.S. 437, 89 S.Ct. 1161 (1969) 7

Dewey vs. Des Moines, 173 U.S. 193, 19 S.Ct. 379 (1899) 7

LIST OF AUTHORITIES (Continued)

Page

McGoldrick vs. Compagnie Generale Transatlantique, 309 U.S. 430, 60 S.Ct. 670 (1940) 7

McCauley vs. Manda Bros. Provisions Co., 202 So.2d 492 (La. App. 1967) 12

McCauley vs. Manda Bros. Provisions Co., 252 La. 528, 211 So.2d 637 (La. Sup. Ct. 1967) 13

McMillen vs. Ferrum Min. Co., 197 U.S. 343, 25 S.Ct. 533 (1905) 9

Murdock vs. City of Memphis, 20 Wall 590, 22 L.Ed. 429 (1875) 7

Rooker vs. Fidelity Trust Co., 261 U.S. 114, 43 S.Ct. 288 (1923) 9

Safeway Stores, Inc. vs. Oklahoma Retail Grocers Assn., 360 U.S. 334, 79 S.Ct. 1196 (1959) 7

State vs. Beamish, 206 La. 579, 19 So.2d 258 (1943) 9

State Farm Mutual Automobile Ins. Co. vs. Duel, 324 U.S. 154, 65 S.Ct. 573 (1945) 7

Waters-Pierce Oil Co. vs. Texas, 212 U.S. 112, 89 S.Ct. 227 (1909) 9

Whitney vs. California, 274 U.S. 357, 47 S.Ct. 641 (1927) 7

LIST OF AUTHORITIES (Continued)

Page

Federal Statutes:

28 U. S. C. 1257 (3) 6

State Statutes:

Art. 1636, *Louisiana Code of Civil Procedure* .. 4, 12

Art. 2167, *Louisiana Code of Civil Procedure* .. 8

Other Authorities:

Rule XI, Section 5, Louisiana Supreme Court ... 9

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STATEMENT OF THE CASE.

Since the petition for certiorari does not [as required by Rule 23] set forth all the facts material to a consideration of the questions presented, respondents deem it necessary to correct certain inaccuracies and omissions in the Statement made by petitioners.

This is a condemnation action brought by two public bodies to acquire fee ownership of some 96.963 acres of land adjoining the Lafayette [Louisiana] Municipal Airport for the extension of runways to accommodate jet aircraft.

Plaintiffs are the Lafayette Airport Commission and the Lafayette Parish Police Jury. For the sake of convenience, these parties will hereafter be referred to as the "Airport Commission."

Defendants consist of the following parties:

(1) J. Maxime Roy and 15 other persons who were co-owners of a 219.80-acre parent tract of which the condemned property formed a part. For the sake of convenience, these parties will hereafter be referred to as the "Roy heirs".

(2) Acadian Development Corporation, which held a sand mining lease on the condemned property granted by the Roy heirs. For the sake of convenience, this party will hereafter be referred to as "Acadian".

The case came for trial on January 6, 1971 before the Fifteenth Judicial District Court of Louisiana sitting at Lafayette, Louisiana. Public purpose and necessity were conceded, and the only issue in contest related to the market value of the condemned property and damages to the remainder caused by the taking.

An extensive sand deposit located on the condemned property had been continuously mined by Acadian since 1960, from which some 694,984 cubic yards of commercial sand had been produced, and from which the Roy heirs had received some $150,191 in royalties.

The Roy heirs and Acadian sought to establish market value of the condemned property in light of its

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highest and best use for sand mining purposes, and to that end, offered the testimony of three sand and gravel operators, three engineers and four real estate appraisers.

On the objection of the Airport Commission, all such evidence was ruled inadmissible by the trial court shortly after the case began. In consequence, the only witnesses who were permitted to take the stand were the Airport Commission's engineer and two appraisers, all of whom testified.

At the outset, both sides recognized that unless a complete record of the excluded evidence were made, as well as a complete record of any rebuttal evidence, a reversal of the trial court's ruling would necessitate a remand. Wishing to avoid such a remand, both sides agreed upon a procedure under the eys of the court which would fully protect the rights of all parties irrespective of the eventual appellate ruling on the admissibility of the evidence.

Stated simply, the Roy heirs and Acadian would be permitted, within 10 days after close of the case, to make a complete record of the excluded evidence and to file it in the record by way of a proffer. Within 10 days after that filing, the Airport Commission would be permitted to make a complete record of its rebuttal evidence.[1] And since both the excluded evidence and

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[1]See the following stipulation entered into immediately before the close of the case:

MR. ABELL: It is stipulated by and between all parties through their counsel that defendants shall have ten (10) days

the rebuttal evidence would be in the record by way of proffer, the appellate court would be in a position to rule on the merits of the case in the event of a reversal of the trial court's ruling on admissibility.

Pursuant to that agreement and Art. 1636 of the *Louisiana Code of Civil Procedure*,[2] the Roy heirs and

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within which to prepare and submit written summations of the testimony of the witnesses whose testimony has been excluded by the ruling of the Court, and may include with that, offerings of any engineering exhibits or any other item which would have been offered in connection with their testimony in chief, had it been heard by the Court.

Further, that the condemnor shall have ten (10) days within which to consider the offerings of defendants and make a rebuttal to the evidence tendered by Proffer of the defendants.

It is further stipulated that all of the experts who would have been called to testify, absent to the ruling of the Court excluding their testimony as being inadmissible, may submit itemized statement of fees for consideration by the court in determining what fees shall be allowable, if any, to the experts of defendants and the condemnor.

MR. LOGAN: In connection with the plaintiff's rebuttal of defendants' proffers, the witnesses which we would call would be Mr. J. Alfred Mouton, Sr., Mr. Preston Babineaux, and Mr. Russell Doiron in connection with appraisals.

In connection with the stand and its market, et cetera, we would call Mr. Dick Wilson with T. L. James, and Mr. Jerry Gibbs or Lew Matthews, with their dredging department. In connection with any engineering data, we would call Mr. Doug McGill, with Domingue, Szabo & Associates. *Your Honor, it will depend on what they put in as to which one I would use.*

[2]That statute provides:

"Where a court rules against the admissibility of any evidence, it shall either permit the party offering such evidence to make a complete record thereof, or permit the party to make a statement setting forth the nature of the evidence. In all cases the court shall state the reason for its ruling as to the inadmissibility of the evidence. This ruling shall be reviewable on appeal without the necessity of further formality.

"If the court permits a party to make a complete record of the evidence held inadmissible, it shall allow any other party to make a record in the same manner of any evidence bearing upon the evidence held inadmissible".

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Acadian filed a complete record of the excluded evidence. That record consisted of the written appraisal reports of their appraisers, as well as the testimony, in affidavit form, of the other experts called by them. These affidavits were duly verified under oath by the witnesses making them. For the sake of convenience, the record of the excluded evidence will hereafter be referred to as "Defendants' Proffer of Evidence".

After the Defendants' Proffer of Evidence was filed in the record, the Airport Commission availed itself of the opportunity of reviewing and analyzing it, and in due course, it made a complete record of its rebuttal evidence. That record consisted of the testimony, in affidavit form, of the Airport Commission's engineer and one of its appraisers. For the sake of convenience, the record so made up by the Airport Commission will hereafter be referred to as the "Rebuttal Proffer of Evidence". The Rebuttal Proffer of Evidence, consisting of some 19 type-written pages, was filed for the express and only purpose of rebutting the Defendants' Proffer of Evidence.

In due course, the trial court rendered judgment fixing the market value of the condemned property and damages to the remainder at $39,043.71, the amount testified by the Airport Commission's appraisers to be fair market value. Under the terms of that judgment, the entire amount was awarded to the Roy heirs and Acadian received nothing.

On appeal, the third Circuit Court of Appeal reversed the trial court's exclusion of the evidence, in-

creased the award to the Roy heirs to $162,087.50 and awarded Acadian $89,000.00 as the value of its sand lease. *Lafayette Airport Commission vs. Roy*, 265 So.2d 459 (La. App. 1972).

With respect to the evidence held inadmissible by the trial court, the Third Circuit Court of Appeal stated:

> "The excluded evidence is properly before us in a proffer of proof." (265 So.2d 469, 468)

The judgment, as thus amended, became final on September 27, 1972 when the Louisiana Supreme Court denied the Airport Commission's application for a writ of certiorari. *Lafayette Airport Commission vs. Roy*, 262 La. 1159, 266 So.2d 444 (1972).

At no time prior to the denial of certiorari by the Louisiana Supreme Court did the Airport Commission ever raise or preserve the federal question it now raises here, nor was such question ever passed upon by either the Louisiana Supreme Court or the intermediate appellate court.

ARGUMENT

I.

The Petition For Certiorari Should Be Denied On Jurisdictional Grounds Because The Federal Question Was Not Timely And Properly Raised In The State Courts Below

Jurisdiction herein is invoked by the Airport Commission on the basis of 28 U.S.C. 1257 (3). It is no long-

er subject to dispute that such jurisdiction must fail if the federal question was not raised and preserved in, and passed upon by the state courts below. *Cardinale vs. Louisiana,* 394 U.S. 437, 89 S.Ct. 1161 (1969), *Safeway Stores, Inc. vs. Oklahoma Retail Grocers Assn.,* 360 U.S. 334, 79 S.Ct. 1196 (1959), *State Farm Mutual Automobile Ins. Co. vs. Duel,* 324 U.S. 154, 65 S.Ct. 573 (1945), *McGoldrick vs. Compagnie Generale Transatlantique,* 309 U.S. 430, 60 S.Ct. 670 (1940), *Whitney vs. California,* 274 U.S. 357, 47 S.Ct. 641 (1927), *Dewey vs. Des Moines,* 173 U.S. 193, 19 S.Ct. 379 (1899), *Murdock vs. City of Memphis,* 20 Wall. 590, 22 L.Ed. 429 (1875).

Was the federal question so raised in and passed upon by the state courts below so as to give this Court jurisdiction? Clearly not.

The Third Circuit Court of Appeal handed down its decision on May 26, 1972 and the Airport Commission's application for rehearing was denied on July 12, 1972. *Lafayette Airport Commission vs. Roy,* 265 So.2d 459 (La. App. 1972). At no point did the Airport Commission ever raise the federal question before the appellate court.

The Louisiana Supreme Court denied certiorari on September 27, 1972. *Lafayette Airport Commission vs. Roy,* 262 La. 1159, 266 So.2d 444 (1972). At no point in its application for certiorari did the Airport Commission ever raise the federal question.

The judgment of the intermediate appellate court became final and executory[3] when the Louisiana Supreme Court denied certiorari on September 27, 1972.

It was not until *after* certiorari was denied and the appellate court judgment became final and executory did the Airport Commission *first* raise the federal question. In what manner was it raised?

The Airport Commission filed a petition in the Louisiana Supreme Court to "vacate" the writ refusal. The application was summarily rejected by the court as follows:

> "Not considered. See Rule XI, Section 5 of this Court".

To be sure, there is no procedure recognized under Louisiana law to "vacate" a writ refusal by the Louisiana Supreme Court. This is necessarily so because the denial of certiorari by that court makes the appellate court judgment a final one, and there is nothing left to be considered.

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[3]Art. 2167 of the *Louisiana Code of Civil Procedure* provides that "[a] judgment of a court of appeal becomes final and executory when the supreme court denies a timely application for a writ of certiorari in the case; or on the expiration of thirty days after the denial of a rehearing by the court of appeal, if no timely application has been made to the supreme court for a writ of certiorari.

Consistent with that principle, Rule XI, Section 5[4] of the Louisiana Supreme Court expressly provides that an application for a rehearing will not be considered when the court has merely refused to grant certiorari. See *Blaize vs. Hayes*, 204 La. 298, 15 So.2d 228 (1943), *State vs. Beamish*, 206 La. 579, 19 So.2d 258 (1943).

And the Airport Commission not having raised the federal question until after the Supreme Court had denied certiorari and the judgment became final, its plea comes too late to serve as a basis for jurisdiction here. See *McMillen v. Ferrum Min. Co.*, 197 U.S. 343, 25 S.Ct. 533 (1905). *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 112, 29 S.Ct. 227 (1909), *Bilby vs. Stewart*, 246 U.S. 255, 38 S.Ct. 264 (1918), *Rooker vs. Fidelity Trust Co.*, 261 U.S. 114, 43 S.Ct. 288 (1923).

II.

The Airport Commission Availed Itself Of The Opportunity Of Examining, Explaining And Rebutting The Defendants' Proffer Of Evidence And Hence Was Not Denied Its Right To A Hearing On The Evidence.

The Airport Commission asserts that it has been denied its constitutional right to a hearing because it

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[4]Section 5, Rule XI of the Louisiana Supreme Court provides: "*An application for a rehearing will not be considered when the court has merely* granted or *refused to grant a writ of certiorari or review* or an alternative writ of mandamus or prohibition, or rule nisi, but a petition for rehearing, if filed within the legal delay, will be considered when the Court has decided a case on a writ of review to the Court of Appeal, or under the court's supervisory jurisdiction, the same as if the case had been decided on appeal.

had no opportunity to cross examine, explain or rebut the evidence in the Defendants' Proffer of Evidence.

Because such is fatal to its position, the Airport Commission carefully avoids all mention of the fact that it was freely given, and completely availed itself of the opportunity to leisurely examine the Defendants' Proffer of Evidence, and to explain and rebut that evidence by means of the Rebuttal Proffer of Evidence.

This the Airport Commission did, and it should not now be permitted to pretend otherwise, especially when the procedure which it now assails was followed pursuant to an agreement reached by its own counsel in the trial court.

The Airport Commission fairly lost its case on valuation on the merits before the state courts. Although it had every opportunity to do so, it never once complained that the procedure worked out by its counsel had the effect of denying its right to a hearing, or that the state courts could not have based an award on the proffered evidence. On the contrary, the entire thrust of its case before the appellate court and the Louisiana Supreme Court was that the evidence in Defendants' Proffer of Evidence was not *persuasive*, and that the award should have been based on the rebuttal evidence.

Thus, at page 7 of the Airport Commission's brief before the appellate court, counsel states:

> "In order to determine the validity of the Defendants' argument, it is only necessary to go to the reports of their appraisers, which were proffered and the rebuttal of the Plaintiff pro-offer by the affidavit of Russell Doiron."

And at page 10 of the same brief, counsel further remarked:

> "Because of the great difference between the market value, as determined by Plaintiffs' appraisers and that determined by Defendants' appraisers and the serious nature of this substantial claim against the public funds for the improvement of the Lafayette Airport, the Lafayette Airport Authority employed the services of Messrs. *Cooper* and Russell Doiron, two of the Deans of Appraisal in the State of Louisiana. *Counsel feels that he could not more adequately state the errors in the methods used by Defendants' appraisers, Chappuis & Angers & Wilkes & Parker, than the rebuttal to Defendants' pro-offer by Mr. Russell Doiron in which he analyzes and points out the errors of each of Defendants' appraisers, a copy of which is made a part of this brief and annexed hereto.*" (Emphasis added).

We submit that the Airport Commission is grasping at straws. It has not been deprived of any constitutionally guaranteed rights. It had full opportunity to litigate this matter and now complains because it does

not agree with the conclusions of value arrived at by the state courts.

The action of the appellate court in deciding the case on the merits on the basis of the proffered evidence is eminently correct. In *Broussard vs. State Farm Mutual Automobile Ins. Co.*, 188 So.2d 111 (La. App. 1966), the court stated:

> "In common law states, upon finding prejudicial ruling as to evidence, the case would ordinarily be remanded for new trial. This is not the rule in Louisiana. Under our state constitution, ordinarily appellate review in civil cases is 'on both the law and the facts'. Louisiana Constitution of 1921, Article VII, Section 29. By reason of this constitutional mandate, a Louisiana appellate court will usually decide the appeal on the merits rather than remanding for new trial and new findings by the trier of fact, when the reviewing court is able to make an independent factual determination of the evidence as contained by the complete record of that sought to be introduced at the trial, including that ruled inadmissible by the trial court but nevertheless included in the record for purposes of appellate review, LSA-C.C.P. Art. 1636". (188 So.2d at p. 114).

The treatment of evidence put into the record after being ruled inadmissible, by using Art. 1636 of the Louisiana Code of Civil Procedure, was dealt with again in *McCauley vs. Manda Bros. Provisions Co.*, 202 So.2d 492 (La. App. 1967). There, the appellate court stated:

> "It is clear from the above that the trial judge has the option of allowing a complete record of the proffered testimony to be made, or to merely permit a statement thereof to be placed in the record. If the latter course is followed, the appellate court is in a position to rule on the admissibility of the evidence, but cannot give it any probative value. If, therefore, the testimony is found to be admissible and essential to a decision in the case, a remand to the trial court becomes necessary to permit the excluded testimony, and any other testimony bearing thereon to be taken". (202 So.2d at p. 496).

The Louisiana Supreme Court granted certiorari in *McCauley*, and its reported decision [252 La. 528, 211 So.2d 637] makes it clear that the rule is otherwise in Louisiana. The Supreme Court remarked:

> "In passing we mention that, contrary to the opinion of the Court of Appeal, we believe that perhaps the procedure followed in the trial court substantially complied with Article 1636 of the Code of Civil Procedure, so as to permit the Appellate Court to consider the evidence proffered by plaintiff (and rejected by the trial court) to establish a causal connection between his eating of the sandwich and his subsequent illness, and that, therefore, the Court of Appeal could have ruled definitely on the liability of Bearden". (211 So.2d at p. 640).

Here, the procedure worked out by counsel for the litigants in the trial court resulted in a complete record

being made of the excluded evidence as well as the rebuttal evidence, so that the appellate court was within its rights in deciding the case on valuation on the merits rather than remanding the matter for new trial.

CONCLUSION

We respectfully submit that the petition for certiorari should be denied. Not only is jurisdiction lacking because the federal question was not timely raised in the state courts below, but more importantly, the Airport Commission availed itself of every opportunity to examine, explain and rebut the very evidence on which the state courts made the valuation award, and hence it should not now be heard to complain that it was denied a hearing.

Respectfully submitted,

JAMES E. DIAZ
P. O. Drawer 3507
Lafayette, Louisiana 70501

W. C. HOLLIER
P. O. Box 52209
Lafayette, Louisiana 70501

EDWARD C. ABELL, JR.
P. O. Drawer 3507
Lafayette, Louisiana 70501

MORGAN J. GOUDEAU, III
170 West Bellevue Street
Opelousas, Louisiana 70570

Attorneys for Respondents

CERTIFICATE OF SERVICE

I, W. C. HOLLIER, one of the attorneys for Respondents and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the ____ day of March, 1973, I served three copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari on each of the below named counsel for petitioners, by mailing such copies thereof in a duly addressed envelope with first class postage prepaid, as follows:

Mr. William E. Logan, Jr.
P. O. Box 3424
Lafayette, Louisiana 70501

Mr. Bertrand De Blanc
1013 Lafayette Street
Lafayette, Louisiana 70501

Hon. Nathan Stansbury
District Attorney
Courthouse Building
Lafayette, Louisiana 70501

Lafayette, Louisiana, this ____ day of March, 1973.

W. C. HOLLIER